Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., et al.,
Respondents.

BRIEF FOR RESPONDENT BOWMAN TRANSPORTATION, INC.

WILLIAM M. PATE
MITCHELL, CLARKE, PATE & ANDERSON
Sixth Floor, Atlanta Federal Savings Building
Atlanta, Georgia 30303
Attorney for Respondent Bowman Transportation, Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

Summary of Argument 3

Argument 6

I. Although Not Requiring the Denial of Retroactive Seniority in All Instances to Applicants Denied Employment in Violation of Title VII, Section 703(h) Places a Substantial Limitation on Rights and Remedies Under the Act 6

II. Since All Findings of Discrimination and the Remedy Were Based on Title VII, and Not on Section 1981, the Latter Statute Provides No Basis for Additional Seniority Relief 15

III. The District Court Property Exercised Its Discretion in Denying Retroactive Seniority As a Remedy, and This Exercise of Discretion Was Correctly Sustained on Appeal 17

Conclusion 30

CASES

Abercrombie v. *Lum's, Inc.*, 345 F.Supp. 387 (D.C. Fla. 1972) 29

Aeronautical Industrial District Lodge v. *Campbell*, 337 U.S. 521 (1949) 23

Atlantic Maintenance Co. v. *N.L.R.B.*, 305 F.2d 604 (3d Cir. 1962) 22

Bowles v. *Goebel*, 151 F.2d 671, 674 (8th Cir. 1945) 17

Clearfield Trust Co. v. *U. S.*, 318 U.S. 363, 366-367 (1943) 15

Dent v. *St. Louis-San Francisco R.R. Co.*, 406 F.2d 399, 403 (5th Cir. 1969) 28

De Sylva v. *Ballentine*, 351 U.S. 570 (1956) 4, 17
E.E.O.C. v. *Container Corp. of America*, 5 FEP Cases 108 (D.C. Fla. 1972) 28
E.E.O.C. v. *Detroit Edison*, ... F.2d ....., 9 EPD ¶9997 (6th Cir. 1975) 18
Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) 23
Golden State Bottling Co. v. *N.L.R.B.*, 38 L.Ed.2d 388 (1973) 23
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 4, 20
Helvering v. *Gowran*, 302 U.S. 238, 245 (1938) 20
Helvering v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935) 17
Jersey Central Power & Light Co. v. *Local Union 327*, 508 F.2d 687, 706 (3d Cir. 1975) 29
Johnson v. *Railway Express Agency*, ... U.S. ....., 10 FEP Cases 817 (1975) 16
Jurinko v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir. 1973), vacated and remanded on other grounds, 414 U.S. 970 (1973) 29-30
Kober v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973) 21
Langnes v. *Green*, 282 U.S. 531, 535-539 (1931) 17
LeBlanc v. *Southern Bell Tel. & Tel. Co.*, 333 F.Supp. 602 (D.C. La. 1971), aff'd per curiam 460 F.2d 1228 (5th Cir. 1972), cert. den. 409 U.S. 990 (1972) 21
Local 53, Asbestos Workers v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) 24
Local 189, United Papermakers and Paperworkers v. *U. S.*, 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970) 8, 24
Manning v. *International Union*, 466 F.2d 812 (6th Cir. 1972), cert. den. 410 U.S. 946 (1973) 21
Marshall v. *Pletz*, 317 U.S. 383, 390 (1943) 17

McCullough v. *Kammerer Corp.*, 323 U.S. 327 (1945) 17
Meadows v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), cert. filed April 25, 1975, O.T. 1974, No. 74-1349 ..... 4, 18, 21, 30
Morrow v. *Crisler*, 479 F.2d 960 (5th Cir. 1973), on rehearing en banc, 491 F.2d 1053 (5th Cir. 1974), cert. den. 42 L.Ed.2d 139 (1974) 24
N.L.R.B. v. *Cone Bros. Contracting Co.*, 317 F.2d 3 (5th Cir. 1963) 22
N.L.R.B. v. *Lamar Creamery Co.*, 246 F.2d 3 (5th Cir. 1957) 22
N.L.R.B. v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) 22
National Metropolitan Bank v. *U. S.*, 323 U.S. 454 (1945) 15
Nix v. *Grand Lodge*, 479 F.2d 382 (5th Cir. 1973), cert. denied 414 U.S. 1024 (1973), pet. for rehearing denied 414 U.S. 1138 (1974) 29
Phelps Dodge Corp. v. *N.L.R.B.*, 313 U.S. 177, 194-198 (1941) 4, 22
H. K. Porter Co., Inc. v. *N.L.R.B.*, 397 U.S. 99 (1970) 3, 13, 14
Potts v. *Flax*, 313 F.2d 284 (5th Cir. 1963) 26
Quarles v. *Philip Morris, Inc.*, 279 F.Supp. 505 (D.C. Va. 1968) 8
J. E. Riley Co. v. *Commissioner of Internal Revenue*, 311 U.S. 55 (1940) 20
Rosenfeld v. *So. Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) 21
Securities & Exchange Commission v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) 20
Stern v. *Lucy Webb Hayes Nat. Training School*, 17 F.R. Serv. 2d 1573 (D.C. D.C. 1973) 29
Teamsters, Local 174 v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 15

Textile Workers v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) 15
Thornton v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974) 18, 21
United Steelworkers of America, Local 1104 v. *U. S. Steel Corp.*, 478 F.2d 1255 (6th Cir. 1973) 21
U. S. v. *Duke*, 332 F.2d 759 (5th Cir. 1964) 24
U. S. v. *Georgia Power Co.*, ... F.Supp. ....., 3 EPD ¶8318, pp. 7073, 7093 (D.C. Ga. 1971), aff'd in part, vacated in part, and remanded, 474 F.2d 906 (5th Cir. 1973) 26
U. S. v. *Jefferson County Bd. of Education*, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (1967) 24
U. S. v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1974) 21
U. S. v. *St. Louis-San Francisco R.R. Co.*, 464 F.2d 301 (8th Cir. 1972), cert. den. 409 U.S. 1116 (1973) 21
U. S. v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. den. 406 U.S. 906 (1972) 8
Waters v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974) 15, 29
Watkins v. *Steelworkers, Local 2369*, 369 F.Supp. 1221 (D.C. La. 1974) 11, 23
Wirtz v. *B. B. Saxon*, 365 F.2d 457 (5th Cir. 1966) 17
Zellerbach Paper Co. v. *Helvering*, 293 U.S. 172, 182 (1934) 17

STATUTES AND RULES

29 U.S.C. §158(d) [National Labor Relations Act, §8(d)] 13, 14
29 U.S.C. §185 [Labor Management Relations Act, §301] 15

42 U.S.C. §1981 [Civil Rights Act of 1866] 4, 15, 16
42 U.S.C. §1983 ..... 15, 16
42 U.S.C. §2000a-3(d) [Title II, Civil Rights Act of 1964] 27
42 U.S.C. §2000c-6 [Title IV, Civil Rights Act of 1964] 27
42 U.S.C. §2000d-1 [Title VI, Civil Rights Act of 1964] 27
42 U.S.C. §2000e et seq. [Title VII, Civil Rights Act of 1964] 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 21, 23, 24, 25, 26, 27, 30
42 U.S.C. §2000e-2(h) [Section 703(h) of Title VII] 2, 3, 6, 7, 8, 11, 12, 13, 14, 20, 21, 29
42 U.S.C. §2000-5(f)(1) [Section 706(f)(1) of Title VII] 28
42 U.S.C. §2000e-5(g) [Section 706(g) of Title VII] 3
42 U.S.C. §2000g-1 [Title X, Civil Rights Act of 1964] 27
Emergency Price Control Act, §205(a), 50 U.S.C. App. §925 20
Federal Rules of Civil Procedure, Rule 23(b)(2) 2, 5, 28, 29
Federal Rules of Civil Procedure, Rule 23(c)(4) 28
National Labor Relations Act [29 U.S.C. §151 et seq.] 3, 25

OTHER AUTHORITIES

110 Cong. Rec. 2566 28
110 Cong. Rec. 2726 (1964) 11
110 Cong. Rec. 6528 (1964) 9
110 Cong. Rec. 7207 (1964) 9
110 Cong. Rec. 7212-7215 (1964) 9
110 Cong. Rec. 7217 (1964) 10
110 Cong. Rec. 14,511 (1964) 10
110 Cong. Rec. 15,893 (1964) 10
110 Cong. Rec. 15,897 (1964) 10

Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harvard Law Review 1598 (1969) 10, 11
EEOC Fifth Annual Report (1970), p. 63 28
H. R. Rep. No. 94, 88th Congress, 1st Sess., 64-66, 71-72 11
3B Moore's Federal Practice (2d ed.), ¶23.65, p. 23-1251 29

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., et al.,
Respondents.

BRIEF FOR RESPONDENT BOWMAN TRANSPORTATION, INC.

QUESTIONS PRESENTED

The second question as stated by petitioners cannot be raised in this Court, because it was not raised in the Court of Appeals, and was not considered or decided by that court. This subject is discussed further in the argument.

The question as stated by petitioners, under the present facts, requires the additional question whether the Court of Appeals correctly held that the District Court did not abuse its discretion in refusing to grant seniority from the date of their rejection to black applicants denied employment as road drivers.

STATEMENT OF THE CASE

This respondent does not agree entirely with petitioners' statements concerning the holdings of the courts below.

In denying retroactive seniority to rejected applicants, the District Court stated the same reasons which were given for its denial of class back pay. It deemed that such relief was not warranted in class actions, and it would bypass the statutory administrative prerequisites to personal suit and thus thwart the Act's emphasis on conciliation and private settlement. Also, the Court stated that it was denying this remedy, along with class back pay, in the exercise of its discretion (Pet. A53-A54).[1]

The Court of Appeals reversed the holding that either Rule 23(b)(2) or Title VII prohibits back-pay awards to unnamed class members. Since it appeared that the District Court had exercised its discretion under a view of the applicable law which the appellate court deemed erroneous, the latter court vacated the portion of the decree denying back pay to the class, and remanded for reconsideration of this issue (Pet. A37-A40). The court did not decide that class members were entitled to back pay.

The Court of Appeals refused to grant application-date seniority to class members who were denied employment. The court stated that this extension of such constructive seniority as a remedy was not permitted under section 703(h) of Title VII, 42 U.S.C. §2000e-2(h) (Pet. A30). This view was not relied upon by the District Court. Despite its statement of this view, the holding of the Court of Appeals was that the District Court "did not abuse its

1. References in this form are to the appendix to the petition for a writ of certiorari.

discretion in refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy" (Pet. A31).

SUMMARY OF ARGUMENT

I.

A. Although not requiring the denial of retroactive seniority in every instance to applicants rejected in violation of Title VII, section 703(h) places a substantial limitation on Title VII. The legislative history reflects the intent of Congress that the 1964 Act should not impair seniority rights already established, even though black persons had been excluded from employment in the unit to which the seniority applied, and that future layoffs or other personnel action might, without violation of Title VII, be based on seniority affected by past racial discrimination. This interpretation was placed on the bill before Congress even before the offering of the substitute bill containing section 703(h). Upon the passage of the substitute bill (Mansfield-Dirksen amendment), this limitation became statutory. A seniority system, even after Title VII, does not lose its bona fide status through racial discrimination in hiring.

B. The limitation of section 703(h) applies to remedies under section 703(g), 42 U.S.C. §2000e-5(g), as well as to substantive provisions of the Act. The applicability of section 703(h) as a limitation upon remedies is controlled by the decision of this Court in *H. K. Porter Company, Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970), dealing with a similar question arising under the National Labor Relations Act, 29 U.S.C. §151 et seq.

II.

The District Court sustained its jurisdiction only under Title VII, and its findings of fact and law were based only on Title VII, not upon 42 U.S.C. §1981. The petitioners did not raise in the Court of Appeals any question about this limited basis of the District Court's findings and remedy, and did not assert there that section 1981 provided a basis apart from Title VII for their claim to retroactive seniority as a remedy. Consequently, this question was not considered or decided by the Court of Appeals. Under controlling authorities, this point, not considered below, may not be raised in the Supreme Court. *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956).

III.

A. Title VII does not change the established principle that the district courts have broad discretion in framing equitable remedies. This discretion may be exercised to grant or withhold a particular kind of relief. The action of the federal chancellor should be sustained unless there is an abuse of discretion. This principle, followed under other federal statutes, is also recognized under Title VII. *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), cert. filed April 25, 1975, O.T. 1974, No. 74-1349; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 195-198 (1941); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944).

B. In framing the remedy, the District Court exercised its discretion consistently with the purposes of Title VII. The decree not only gives a large measure of restitution to unnamed class members, but provides for preferential recruitment and hiring of black persons, not limited to victims of discrimination, to remove the visible signs of past discrimination against other black persons. The court

thus sought to promote the dual objectives of giving substantial restitution to victims and possible victims of discrimination, and preventing present or future discrimination. This remedy represents a proper exercise of the court's discretion and was entitled to be sustained on appeal.

C. The District Court properly made a distinction between individual claims of the persons who had resorted to the administrative procedures under Title VII and brought the court action, and the class members whose individual claims had not been submitted to the EEOC. The court acted consistently with the purposes of Title VII in granting individual redress to the individual complainants and in granting to the class members the kind of relief that could be applied to the class as a whole. This exercise of discretion is supported by the court's desire to avoid its own inundation with a mass of detail, and by the congressional purpose under Title VII to promote conciliation of employment discrimination cases. The court's limitation of the scope of the litigation was within its discretion in authorizing a class action under Rule 23(b)(2). This rule, contemplating "injunctive or declaratory relief applicable to the class as a whole," also supports the remedy framed by the District Court.

ARGUMENT

I.

Although Not Requiring the Denial of Retroactive Seniority in All Instances to Applicants Denied Employment in Violation of Title VII, Section 703(h) Places a Substantial Limitation on Rights and Remedies Under the Act.

A. This Section Protects Seniority Rights Under Bona Fide Systems Affected by Past Racial Discrimination.

The company agrees that section 703(h) does not deprive a district court of power, in its discretion, to grant retroactive seniority in Title VII actions to complainants who have been denied employment in violation of the Act. However, the company does not agree with petitioners' interpretation which seeks to read this section out of the statute. Section 703(h) places a substantial limitation upon rights and remedies under Title VII. Its terms and legislative history reflect a congressional purpose to protect seniority rights attributable to pre-Act employment, even during periods when blacks were excluded from the seniority unit. The protection also extends logically to seniority accruing under bona fide systems after the passage of Title VII, but the section should not, under all circumstances, prevent the award of seniority within the system to an applicant discriminatorily denied employment.

This section gives protection to bona fide seniority systems. The statute does not define a "bona fide" system, but in view of the widespread use of seniority in American industry the meaning is rather clear. There is no general

attack here on the seniority system. It gives priority in job competition, primarily in cases of layoff and assignment of "regular runs" (48a-50a), based on length of employment in the seniority unit. It can hardly be argued that this kind of system in itself lacks bona fides.

Petitioners offer an interpretation of the legislative history of 703(h) which, if accepted, would practically nullify this part of the statute. They also suggest that the present application of seniority systems affected by past racial discrimination is a violation of Title VII, reasoning in part that a seniority system with racially discriminatory effects is not a "bona fide" system. Although the present case does not involve questions of discrimination before Title VII, the principle suggested by petitioners would apparently bring into question the present use, in personnel decisions, of seniority attributable to employment during a period of past racial discrimination, even including discrimination antedating Title VII. Bowman, like many employers, has a seniority system giving credit for employment, before and after the passage of Title VII, during periods of black exclusion (under the findings of this case) from relevant employment. The company thus wishes to avoid a statutory interpretation which would have widespread effect on vested seniority rights. It is submitted that petitioners' construction of the statute is not correct, and is based largely upon an erroneous interpretation of the legislative history.

It is not contended that this section gives protection to a seniority system which is not presently neutral along racial lines. If the system is designed to separate "white jobs" from "Negro jobs", it is not bona fide. Through an extension of this reasoning, the courts have tended to overturn or modify seniority systems which are less than plant-wide in scope and tend to place incumbent Negroes under

a continuing disadvantage. See *Local 189, United Papermakers and Paperworkers* v. *U. S.*, 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970); *U. S.* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. den. 406 U.S. 906 (1972); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (D.C. Va. 1968). However, the Fifth Circuit stated correctly that discrimination in hiring does not affect the bona fides of the seniority system (Pet. A30). Discrimination of this type can be remedied in a proper case by restitution with appropriate seniority credit, but the system itself is still bona fide and continues within the protection of 703(h).

The enactment of this section reflects the concern of Congress that Title VII might have a detrimental effect on existing seniority rights. Obviously many seniority systems were in effect whose incumbents had received preference through racial discrimination. This section indicates that these seniority rights may be recognized without violation of Title VII. The Act was to be prospective in application, and would not seek to remedy discrimination that occurred in the past. Without section 703(h), it could be argued with some logic that any present personnel decision was in violation of Title VII if it was based on seniority acquired during a period of exclusion of Negroes. This section makes certain that the seniority system cannot be brushed aside as not bona fide merely because its present application has a racially disparate impact. Thus section 703(h) gives a status quo effect to existing seniority systems that are bona fide and to seniority rights under those systems. If it applied only to seniority systems having no present adverse effect upon minority persons, the section would be a meaningless appendage to the Act. A construction is to be favored which gives meaning to this section.

The legislative history, although not extensive, indicates strongly that Title VII was not intended to impair seniority rights acquired during a period of exclusion of blacks before the effective date of the 1964 Act. On April 8, 1964, Senator Clark, one of the bipartisan captains of Title VII,[2] introduced into the record three documents expressing the view that Title VII as drafted would not require revision of seniority practices in plants from which blacks had formerly been excluded. These were an interpretative memorandum prepared by the Department of Justice at Senator Clark's request,[3] an interpretative memorandum prepared by Senators Clark and Case,[4] and

---

2. 110 Cong. Rec. 6528 (1964).

3. 110 Cong. Rec. 7207 (1964). The relevant portion of this memorandum is as follows:

> First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result.

4. 110 Cong. Rec. 7212-15 (1964). The relevant portion of this memorandum is as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when

(Continued on following page)

responses prepared by Senator Clark to questions posed by Senator Dirksen.[5]

After a series of meetings of Senate leaders, including Senators Mansfield, Dirksen and Humphrey, for the preparation of amendments to the bill, the Mansfield-Dirksen amendment was offered on May 26, 1964, as a substitute for the entire bill. This amendment contained section 703(h).[6] The substitute bill passed the Senate without further discussion of seniority practices.[7] It also passed the House unchanged without debate on the seniority issue.[8] Just before the final vote, Representative McCulloch, a supporter of the bill, said that the bill did not permit the federal government to destroy the job seniority rights of union or non-union employees.[9]

Footnote Continued—

the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

5. 110 Cong. Rec. 7217 (1964). One response stated that seniority rights were in no way affected by the bill, and added specifically that under a "last hired, first fired" agreement a Negro who happened to be the last hired could be the first fired so long as this action was taken because of his status as the last employee hired and not because of his race. See Cooper and Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harvard Law Review, 1598, 1609-10 (1969) [hereinafter cited as "Cooper and Sobol"].

6. Cooper and Sobol, p. 1610.

7. 110 Cong. Rec. 14,511 (1964).

8. 110 Cong. Rec. 15,897 (1964).

9. 110 Cong. Rec. 15,893 (1964).

The House bill made no express reference to seniority systems. Some members of the Judiciary Committee dissented from the favorable report on Title VII, in part on the ground that it would require the revision of seniority practices by plants that had previously refused to hire blacks.[10] Representative Dowdy proposed an amendment providing that the provisions of this title "shall not be applicable to any employer whose hiring and employment practices are pursuant to: (1) a seniority system . . ."[11] This amendment was defeated without discussion or debate.

Petitioners discount the Clark statements on the ground that they were made before section 703(h) was added to Title VII, and therefore were not addressed to that section. There is also some case and law review authority for this view.[12] However, a different interpretation of the legislative history is more logical.

The questions raised by Senator Dirksen, to which the Clark memoranda were directed, indicated the fear among some senators that Title VII would result in impairment of existing seniority rights, particularly where blacks in the past had been excluded from employment. The strong statements that the Act would not affect these seniority rights were made even without the aid of section 703(h). The bill then contained no provision giving specific protection to seniority rights. Senator Dirksen, who raised the question, was a member of the group of Senate leaders who prepared the substitute bill containing section 703(h). Apparently there was lingering doubt about the effect of

---

10. H. R. Rep. No. 94, 88th Congress, 1st Sess., 64-66, 71-72.

11. 110 Cong. Rec. 2726 (1964).

12. *Watkins* v. *Steelworkers Local 2369*, 369 F.Supp. 1221 (D.C. La. 1974); Cooper and Sobol, p. 1613.

the Act on seniority rights even after the introduction of the Clark memoranda. The protection of seniority rights was then made statutory by the addition of 703(h). It is not likely that the substitute bill, with this section added, gives less protection to established seniority rights than that already read by implication into the bill containing no express protection of seniority.

The wording of 703(h) is not substantially different from that of the Clark memoranda. The reference to "bona fide" seniority systems is apparently a precaution against improper use of seniority as a cloak for discrimination. But a primary purpose of 703(h) was to protect seniority rights acquired during pre-Act periods of racial discrimination. Because of this history of discrimination, the giving of continued effect to these seniority rights will naturally have some impact along racial lines. However, the meaning of section 703(h) is that bona fide seniority systems will survive the ban of Title VII, and the system does not lose its "bona fide" status because of the past exclusion of blacks, particularly before the effective date of Title VII.

The rejection of the Dowdy amendment sheds no light on the meaning of section 703(h). Since this amendment was defeated without discussion or debate, there is no indication of a reason for this action. However, an obvious basis for objection appears in the wording of the amendment, which would have the effect of excluding the employer himself from coverage rather than just his seniority practices. Furthermore, the rejection of that amendment loses most of its significance in face of the subsequent enactment of section 703(h).

In summary, although section 703(h) does not provide a complete statutory obstacle to the granting of retroactive seniority to applicants rejected in violation of Title VII,

this section places a substantial limitation on the substantive provisions of the Act. There should be no impairment of seniority rights under bona fide systems which antedated Title VII. Similarly, recognition should be given to post-Title VII seniority rights accruing under bona fide systems, but these rights may be affected by the grant of retroactive seniority, in the discretion of the district court, to discriminatees granted restitution under Title VII decrees. For reasons hereafter discussed, this remedy should ordinarily be included only in individual relief to claimants before the court, and should not be included in the general injunctive relief to unnamed class members.

B. Section 703(h) Places a Limit on Remedies Which May Be Granted Under Title VII.

Petitioners state correctly that section 703(h) appears in the part of the Act which defines employment practices made unlawful by the statute. It does not on its face relate directly to remedies. However, it does not follow that this section has no effect on remedies.

A similar question was considered by this Court and decided adversely to petitioners' position in *H. K. Porter Company, Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970). That case, arising under the National Labor Relations Act, involved similar considerations. The NLRB had held that the employer did not bargain in good faith upon a union proposal for checkoff dues. Since the employer had refused in bad faith to agree to this proposal, the Board's remedy included a requirement that the employer agree to the checkoff clause. Before this Court the Board argued that Section 8(d) of the Act, 29 U.S.C. §158(d), providing that the obligation to bargain does not require either party to accept a proposal or make a concession, applies only to the sub-

stantive provisions defining unfair labor practices and is not a limitation upon the Board's remedial powers.

Although observing that as a matter of strict, literal interpretation the relevant portion of section 8(d) refers only to the occurrence of a violation and not to the question of remedies, this Court stated, in substance, that it did not follow from this observation that the remedial powers of the Board were not limited by the same consideration which led to the enactment of section 8(d). Since this section prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Court thought it would be anomalous to hold that the Act permitted the Board to compel agreement as a matter of remedy. Although the Board's remedial powers are broad, they are limited to the effectuation of the policies of the National Labor Relations Act. Thus the Court held that the Board was prohibited under section 8(d) from ordering the respondent to accept the checkoff proposal.

The same reasoning is applicable to the present question concerning the effect of section 703(h). The considerations which led Congress to except established seniority rights from the operation of the substantive provisions of Title VII logically require that remedies be limited in the same manner. Unless the limitation operates also upon remedies, the policy behind it would be defeated. This question should be controlled by the reasoning followed in *H. K. Porter.*

If this question is reached, the remedy available under section 1981 should still be limited by section 703(h). The 1866 Act does not provide a comprehensive scheme of regulation of race discrimination in employment. It provides only a general principle, and a body of substantive law under section 1981 must be fashioned by the federal

courts in the manner followed under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, under the mandate of *Textile Workers* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957). See also *Teamsters, Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Nat. Metropolitan Bank* v. *U. S.,* 323 U.S. 454 (1945); *Clearfield Trust Co.* v. *U. S.,* 318 U.S. 363, 366-367 (1943). The decision in *Johnson* v. *Railway Express Agency,* infra, holding that the claims under the statutes are separate, does not relate to the development of a body of substantive law under section 1981.

In order to avoid an anomalous situation, in fashioning this body of substantive law the courts must follow the more specific and more comprehensive regulation of employment discrimination contained in Title VII. Any other course will lead to undesirable conflicts of substantive law. If a seniority system passes scrutiny under Title VII, it should be held not to violate section 1981. This reasoning, applied in *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F.2d 1309 (7th Cir. 1974), provides a key to accommodation of the two statutes, and finds strong support in the approach taken by this Court to the resolution of similar problems under section 301.

II.

Since All Findings of Discrimination and the Remedy Were Based on Title VII, and Not on Section 1981, the Latter Statute Provides No Basis for Additional Seniority Relief.

The complaint recites that this action was brought under Title VII and under 42 U.S.C. §1983, and that it is based on deprivation of rights under Title VII and 42 U.S.C. §1981 (4a, 14a). However, the District Court's findings

and conclusions of law are based entirely on Title VII, and not upon section 1981 or 1983 (Pet. A45, A52-A54). The District Court referred to the 1866 Act only in holding that the individual claim of the plaintiff Franks under section 1983 was barred by a Georgia statute of limitations (Pet. A59). Before the Court of Appeals petitioners made no contention that the District Court had erred in limiting its findings and conclusions to Title VII, or that the findings should be expanded to show violations also of section 1981. The Court of Appeals did not overturn or change the findings of the District Court in this respect. In withholding retroactive seniority from rejected applicants, the Court of Appeals was expressly applying Title VII, and did not discuss the availability of further relief under section 1981 (Pet. A30). Thus petitioners, in contending that section 1981 provides a basis, apart from Title VII, for the requested relief are raising a question not considered or decided by the Court of Appeals.[13]

This Court has recently emphasized that a claim under section 1981 is distinct and independent of an action under Title VII. *Johnson* v. *Railway Express Agency*, ... U.S. ....., 10 FEP Cases 817 (1975). Thus in *Johnson* the state statute of limitations applicable to the 1981 action was not tolled during the pendency of a charge before the EEOC. In the present case the claim under section 1981, not sustained by the District Court and not submitted to the Court of Appeals, is separate and independent of the Title VII claim under which the seniority relief was denied. It is too late for petitioners to seek to revive the claim under section 1981 as a basis for the award of additional seniority to class members.

---

13. Even after the decision of the Court of Appeals, the petitioners did not assert in their petition for rehearing that retroactive seniority should have been provided specifically under section 1981 even though it was not available under Title VII.

The Supreme Court has long applied the rule that it will not decide a point urged in an attack upon a judgment below, where the question was not raised in the Court of Appeals. *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327 (1945); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 182 (1934); *cf. Marshall* v. *Pletz*, 317 U.S. 383, 390 (1943); *Langnes* v. *Green*, 282 U.S. 531, 535-539 (1931). There is no reason here for departure from this principle.

III.

The District Court Properly Exercised Its Discretion in Denying Retroactive Seniority As a Remedy, and This Exercise of Discretion Was Correctly Sustained on Appeal.

A. The Principal Discretion in Framing Remedies Under Title VII Lies with the District Court.

In the determination of the nature and scope of the equitable remedy the primary discretion lies with the district court. The remedy must be consistent with the purposes of the statute,[14] but so long as he acts consistently with that purpose the district judge as federal chancellor has a wide range of discretion in granting or denying any particular relief.

The granting or withholding of the seniority remedy rested within the discretion of the district judge. In exercising this discretion the court could properly consider a number of factors. The grant of seniority as a remedy

---

14. See *Bowles* v. *Goebel*, 151 F.2d 671, 674 (8th Cir. 1945); *cf. Wirtz* v. *B. B. Saxon*, 365 F.2d 457 (5th Cir. 1966).

necessarily affects conflicting interests of different employees. Seniority by its nature is intended to have an effect upon job competition. A benefit in the form of additional seniority to a group of employees works a corresponding detriment to other employees. The proper accommodation of these competing interests rests in the discretion of the district judge framing the decree. Also properly to be considered is the interest of the employer in having an experienced work force. The Title VII decree should be remedial and not punitive.

The district judge may also give consideration to the absence of notice to incumbent employees whose seniority standing would be impaired by the grant of retroactive seniority to persons hired under the decree. These employees have not had an opportunity to protect their interests. This factor was deemed important in *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975). This problem is not solved by joinder of the union as a party, since the union as bargaining agent has an equal obligation to persons already hired preferentially under the District Court's decree.

Other considerations are appropriate. In *E.E.O.C.* v. *Detroit Edison*, ... F.2d ....., 9 EPD ¶9997 (6th Cir. 1975), the court held that retroactive seniority should be denied because the government as class representative had not requested it. Also appropriate is the distinction drawn by the District Court in this case between individual and class remedies (discussed below). In dealing with a similar question involving transferees to road driving, the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974), sustained a distinction between employees who had not requested transfer and those who had made a request for transfer or had filed a charge with

the EEOC. The district court, exercising its discretion to limit the seniority credit granted to both groups, provided retroactive seniority for the latter group beginning six months after their initial request for transfer, if then qualified (but not earlier than six months after the effective date of Title VII), while the group not requesting transfer was to have seniority beginning 18 months after they became qualified for road positions (but not before July 1, 1967). The appellate court rejected the contention that the transferees should have a full seniority carryover since transfers without full seniority would perpetuate past discrimination. In holding that the district court had properly declined to dislodge incumbent over-the-road drivers, the appellate court stated that the legislative history of Title VII "shows a clear congressional intent to lodge wide discretionary powers in district judges in fashioning remedies."

The district judge could also give consideration to the need for this remedy as a means of giving substantial restitution to anyone who might be a victim of discrimination. Since the record reflects that the company was experiencing an annual turnover of approximately 50 percent among road drivers (27a, 41a), it can be seen that any person hired preferentially under the decree would move rapidly up the seniority ladder. The discretion of the District Court could properly have been influenced by the apparent lack of need for this remedy.

The district judge exercised his discretion to withholding the remedy in question. There was no basis on appeal for overturning this exercise of discretion. The Court of Appeals concluded that the District Court had not abused its discretion in declining to grant retroactive seniority. Even if the Court of Appeals erroneously con-

ceived the effect of section 703(h), it correctly upheld the District Court's exercise of discretion.[15]

This Court has sustained the traditional discretion of courts of equity to withhold equitable relief under other statutes. In *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), this Court considered such a question arising under emergency wartime legislation for the control of prices. Section 205(a) of the Emergency Price Control Act provided for issuance of an injunction by the district court upon application of the administrator. Although a literal reading of the statute suggested that the granting of the injunction was perhaps mandatory, this Court held that the district judge had the power to withhold this remedy. The following passage from the opinion is pertinent here (321 U.S. at 329-330):

> * * * We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity." * * * The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. * * *

15. Where the court reaches a correct result but gives the wrong reason, its judgment should be sustained. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *J. E. Riley Co.* v. *Commissioner of Internal Revenue*, 311 U.S. 55 (1940); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1938).

The Court gave that statute an interpretation which afforded equity courts an opportunity to follow their traditional practices in treating proceedings under that Act.

The court's discretion to withhold a particular remedy has been frequently sustained in cases under Title VII. In *Meadows* v. *Ford Motor Company*, 510 F.2d 939 (6th Cir. 1975), a decision which petitioners assert to be in conflict with the holding below on the effect of section 703(h), the court recognized that the grant or denial of retroactive seniority to rejected applicants was a matter within the discretion of the trial court. Similarly, in *Thornton* v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974), the court sustained the discretion of the district court to withhold seniority relief from some discriminatees and held that the award of back pay rested within the sound discretion of the trial judge. In other cases the courts of appeals have sustained the discretion of the district courts to deny back pay as a remedy to discriminatees under Title VII. *U. S.* v. *St. Louis-San Francisco R.R. Co.*, 464 F.2d 301 (8th Cir. 1972), cert. den. 409 U.S. 1116 (1973); *U. S.* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1974); *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), cert. den. 410 U.S. 946 (1973); *United Steelworkers of America, Local 1104* v. *U. S. Steel Corp.*, 478 F.2d 1255 (6th Cir. 1973); *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 333 F.Supp. 602 (D.C. La. 1971), aff'd per curiam 460 F.2d 1228 (5th Cir. 1972), cert. den. 409 U.S. 990 (1972); *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Rosenfeld* v. *So. Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

The cases cited by petitioners arising under the National Labor Relations Act do not deal with the question. Although the courts have enforced orders of the NLRB requiring reinstatement of rejected applicants with seniority, or "without prejudice to seniority", the courts did not rule upon the seniority remedy or upon the Board's discretionary power to grant or deny it. See *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3d Cir. 1962); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 3 (5th Cir. 1957); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F.2d 3 (5th Cir. 1963).

In *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194-198 (1941), this Court, in sustaining the Board's order directing the employment of rejected applicants with back pay, acknowledged that these remedies were discretionary with the Board. The Court's statement on the latter remedy (313 U.S. at 198) is equally applicable to the seniority remedy here: "The remedy of back pay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back-pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

In *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), this Court reversed the Court of Appeals' modification of an NLRB back-pay order. The appellate court had eliminated back pay after a certain date because of the Board's "inordinate delay." This Court held that the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders. Again the emphasis is upon the discretion of the Board whose position is somewhat analogous to that of a district court. In none of the

other cited cases did the Court make a ruling which touches upon the present issue.[16]

The real emphasis in all these cases is upon the discretion of the district court and the NLRB, respectively, in framing remedies for violations of Title VII and the National Labor Relations Act. That discretion was properly exercised in this case and was correctly sustained on appeal.

B. In Framing the Remedy the District Court Exercised Its Discretion Consistently with the Purposes of the Statute.

The courts in framing remedies for racial discrimination in employment have sought to accomplish either of two purposes. One purpose is to provide restitution for victims of discrimination. The other, and certainly the more important purpose, is to prevent present discrimination. See *Watkins* v. *Steelworkers, Local 2369*, 369 F.Supp. 1221 (D.C. La. 1974). The District Court's remedy in this case should be viewed in this light.

In effectuating the latter purpose, the courts have provided remedies which give preferential treatment to minority persons who themselves have not been the victims of past discrimination. These remedies, involving preferential hiring or upgrading and like relief, generally give preference to blacks as blacks and not as the victims of past discrimination. In present-day parlance under

---

16. *Golden State Bottling Co.* v. *N.L.R.B.*, 38 L.Ed.2d 388 (1973), dealt with the liability of a successor employer who acquired the business after issuance of the Board's reinstatement and back-pay order. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), sustained the validity of a contractual provision giving pre-employment seniority credit for military service. The questions in *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U.S. 521 (1949) are even more remote to present issues.

Title VII these are "race conscious" remedies. See *Morrow* v. *Crisler*, 479 F.2d 960 (5th Cir. 1973), on rehearing en banc, 491 F.2d 1053 (5th Cir. 1974), cert. den. 42 L.Ed.2d 139 (1974); *U. S.* v. *Duke*, 332 F.2d 759 (5th Cir. 1964); *U. S.* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (1967); *Local 189 United Papermakers* v. *U. S.*, 416 F.2d 980, 988 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970); *Local 53 Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969).

In the present case the District Court ordered preferential hiring consideration for the class of persons consisting of rejected black applicants for road-driving positions. Similarly, preferential seniority credit was ordered for black employees seeking transfers or promotions. On remand the Fifth Circuit directed the District Court to give additional seniority credit to black employees in the latter category, and also to give additional hiring relief to blacks as blacks. In particular the Court of Appeals directed that the District Court determine on the basis of an updated record what "*Morrow* type" relief, if any, is appropriate. Although the updated record may indicate that no such relief should be granted, the Court of Appeals has required that consideration be given to the preferential hiring of black persons. The type of relief permitted under *Morrow* is a complete freeze on the hiring of whites or the establishment of a hiring ratio as between blacks and whites. Either form of relief is intended to require preference in hiring to black persons and a corresponding disadvantage to whites.

It can be seen that these remedies go somewhat beyond restitution to the victims of unlawful practices. The underlying principle is preference to members of one race to offset past discrimination against the race as a whole, and to remove the visible signs of such discrimination.

The seniority portions of the decree should be measured in terms of the decree as a whole. The petitioners sought more than restitution, and they got somewhat more. Thus, the failure of the District Court in this context to give full retroactive seniority to each black applicant hired preferentially under the decree, loses most of its significance. For this reason the remedies under Title VII likewise cannot be compared precisely to those provided under the National Labor Relations Act. Under the latter statute restitution is the controlling principle, and remedies are generally drawn to fit specifically the unfair labor practice involved. Under Title VII, and in this case, the remedy provides more than restitution in effectuating the statutory purposes.

The company does not support or attack this broad type of remedy. That question is not now involved in this case. It submits, however, that the court's failure, in its discretion, to award retroactive seniority to rejected applicants should be viewed in the context of the broad relief granted to the various classes of black persons involved, as well as to other black persons who may be the beneficiaries of preferential hiring in the future. It can hardly be said that the remedy as framed is not consistent with the purposes of Title VII.

C. The District Court's Distinction Between Individual and Class Remedies Was Proper Under Title VII.

In framing the remedy the District Court drew a distinction between the individual claimants who initiated and maintained the court action after resorting to the statutory administrative procedures before the EEOC, and the unnamed class members whose individual claims had not been submitted to the Commission or asserted in court.

The court stated that such specific, individual relief as retroactive seniority was not warranted in class actions. The court pointed out the findings that would be required in each case before a determination concerning retroactive seniority could be made, such as the existence of a vacancy, qualifications, and performance by every class member. It noted that there was no evidence upon which these multiple conclusions could be based (Pet. A54). The District Court also noted, more importantly, that the granting of this relief to class members would bypass the statutory administrative prerequisites to personal suit established by Title VII, and that the statutory emphasis on conciliation and private settlement would be thwarted (Pet. A54).

The trial court gave the exercise of discretion as an additional basis for denial of this relief to class members (Pet. A54). The court was following the reasoning which it had previously applied to similar questions in *U. S.* v. *Georgia Power Co.*, ... F.Supp. ....., 3 EPD ¶8318, pp. 7073, 7093 (D.C. Ga. 1971), aff'd in part, vacated in part, and remanded, 474 F.2d 906 (5th Cir. 1973). In the latter case it drew a distinction between the individual redress which may be given to an individual claimant after exhaustion of the administrative procedures, and the more general type of relief that may be extended to the class as a whole. Thus, the scheme of relief envisioned by Title VII would "insulate the court from inundation by a mass of detail in one suit" (3 EPD at pp. 7093-7094). *Cf. Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963).

Even if retroactive seniority may be granted under some circumstances as a Title VII class remedy, the foregoing considerations were a proper basis for the court's exercise of discretion to deny the remedy in this case. First, the court was relying upon the burden of detail into

which it would be submerged if numerous individual claims of class members, each with individual elements of proof, could be litigated in a class action. This consideration was clearly a proper basis for the court's discretion, since the injection of the individual claims of unconsenting class members would greatly enlarge the scope of litigation, a result not necessary to the effectuation of the policies of Title VII.

Next the court noted that the adjudication of these individual claims in a class action would bypass the statutory administrative procedure with its emphasis on conciliation. The District Court was thus exercising its discretion in accordance with a clearly revealed statutory purpose. The 1964 Act reflects an intention to favor conciliation over court enforcement. This purpose permeates the framework of the statute. Title II, dealing with discrimination in public accommodations, states that after a civil action has been brought, the court may refer the matter to the Community Relations Service as long as the court believes there is a reasonable possibility of obtaining voluntary compliance. 42 U.S.C. §2000a-3(d). Title IV, concerning the desegregation of public education, precludes the attorney general from filing suit until the school board has had a reasonable time to correct any discriminatory practice. 42 U.S.C. §2000c-6. Title VI, affecting discrimination in federally assisted programs, prohibits discontinuation of federal funding until it is determined that a discriminatory practice cannot be terminated by voluntary means. 42 U.S.C. §2000d-1. Title X establishes a Community Relations Service to assist in resolving disputes by conference and conciliation. 42 U.S.C. §2000g-1.

The legislative history of Title VII reflects a congressional intention that suit would be brought only if a settlement could not be achieved through conciliation. For

example, a provision of the House bill which would have allowed a civil action to be brought in advance of conciliation, was deleted "to make certain that there will be a resort by the Commission to conciliatory efforts before it resorts to a court for enforcement." 110 Cong. Rec. 2566 (Remarks by Rep. Celler). As the Fifth Circuit has stated: "It is not to be doubted that Congress did intend that where possible these controversies should be settled by conciliation rather than by litigation. The statute ought to be so administered." *Dent* v. *St. Louis-San Francisco R.R. Co.*, 406 F.2d 399, 403 (5th Cir. 1969). It is noteworthy that the 1972 amendments provide that the EEOC must pursue efforts to eliminate the alleged unlawful employment practice by conference, conciliation, and persuasion, before bringing action in court. 42 U.S.C. §2000e-5 (f)(1); see *E.E.O.C.* v. *Container Corp. of America*, 5 FEP Cases 108 (D.C. Fla. 1972). When this action arose the EEOC was successfully conciliating about 38 percent of the charges it attempted to conciliate. EEOC Fifth Annual Report (1970), p. 63. The District Court was thus seeking to promote the congressional purpose of securing the adjustment of employment discrimination cases through the conciliation procedures of the Commission. This purpose was clearly a proper basis for the exercise of the court's discretion.

The court's refusal to entertain and determine the individual claims for retroactive seniority was a proper exercise of its discretion to control the scope of a class action authorized under Rule 23(b)(2) of the Federal Rules of Civil Procedure (Pet. A53).[17] Under Rule 23(c)(4) the District Court had a broad discretion in determin-

17. There was no certification of the class action before trial. The authorization of the action under Rule 23(b)(2) appears in the conclusions of law (Pet. A53), and the classes are defined in the decree (Pet. A66-A67).

ing and limiting the issues to be included in the class action.[18] The distinction drawn by the District Court between individual relief and class relief follows Rule 23(b)(2), which expressly contemplates "injunctive relief or corresponding declaratory relief with respect to the class as a whole." Since the seniority claims require individual determination on the basis of differing facts in each case, the court exercised its discretion to limit the class action and the class remedy to relief which may be granted generally to the class as a whole.

The Fifth Circuit did not fully accept the distinction drawn by the District Court between individual and class relief; it reversed the holding, on this basis, that back pay was not "warranted" as a remedy in a 23(b)(2) class action, and remanded this issue for reconsideration (Pet. A40). However, this distinction was still a proper consideration in the District Court's exercise of its dual discretion to determine the equitable relief to be included in the remedy, and to determine the scope of the class action. On the seniority question the District Court's discretion was sustained on appeal.

There is a dearth of circuit court authority for the granting of this remedy to unnamed class members. In *Jurinko* v. *Edwin L. Wiegand Co.*,[19] 477 F.2d 1038 (3d Cir.

18. See 3B Moore's Federal Practice (2d ed.), ¶23.65, p. 23-1251; *Nix* v. *Grand Lodge*, 479 F.2d 382 (5th Cir. 1973), cert. denied 414 U.S. 1024 (1973), Pet. for Rehearing denied 414 U.S. 1138 (1974); *Stern* v. *Lucy Webb Hayes Nat. Training School*, 17 F.R. Serv. 2d 1573 (D.C. D.C. 1973); *Abercrombie* v. *Lum's, Inc.*, 345 F.Supp. 387 (D.C. Fla. 1972).

19. The effect of section 703(h) was not discussed in this decision. The same court has subsequently expressed approval of the Fifth Circuit's view concerning section 703(h) as a bar to "fictional" seniority. *Jersey Central Power & Light Co.* v. *Local Union 327*, 508 F.2d 687, 706 (3d Cir. 1975). This construction was also approved in *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1317-1320 (7th Cir. 1974).

1973), vacated and remanded on other grounds, 414 U.S. 970 (1973), relied upon by petitioners as a decision in conflict with the holding below, the court was dealing only with individual relief. In *Meadows* v. *Ford Motor Co.*, supra, involving a class action, the question was remanded, although the court did hold that there is no prohibition in the statute upon the grant of retroactive seniority.

CONCLUSION

This respondent submits that the District Court properly exercised its discretion to deny retroactive seniority to class members. The court's discretion as exercised was consistent with the purposes of Title VII and was therefore entitled to be sustained on appeal. The Court of Appeals correctly held that the District Court did not abuse its discretion in withholding this remedy. Therefore the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

WILLIAM M. PATE

Attorney for Respondent Bowman Transportation, Inc.

MITCHELL, CLARKE, PATE & ANDERSON

Sixth Floor, Atlanta Federal Savings Bldg.

Atlanta, Georgia 30303

404: 577-6010